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IN THE

Supreme Court of the United States

October Term, 1976
No. 76-99

OCCIDENTAL LIFE INSURANCE COMPANY OF CALIFORNIA,

Petitioner,

vs.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondent.

REPLY BRIEF FOR THE PETITIONER.

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ARGUMENT.

A. The 180-Day Federal Limitation Period.

With regard to the 180-day language in Title VII, only five points raised in the EEOC's Brief warrant a response, all other points contained therein having been fully dealt with in Petitioner's Opening Brief.

First, the threshold problem for the EEOC in this case is the necessity of giving *some* meaning to the 180-day provision as an alternative to Petitioner's contention that this language constitutes a limitation upon the EEOC's right to sue. Thus, the EEOC argues to this Court that the 180-day provision is "merely a temporary bar to institution of a private action."

EEOC Brief, pp. 6, 16.[1] However, this argument is a disingenuous one, for the EEOC's *own* actions refute the very interpretation which it urges to this Court. The fact is that in numerous other cases the EEOC has insisted that the 180-day provision does *not* constitute a temporary bar to a private suit during the 180-day period.[2] Furthermore, the EEOC's practice is to issue "right to sue" letters on request within the 180-day period. *SCHLEI & GROSSMAN* 776. The EEOC, therefore, is here urging this Court to accept an interpretation of the language in question which is *totally at odds* with its practice and the interpretation it has urged or supported before innumerable federal judges prior to today.[3]

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[1]Undoubtedly because of the EEOC's concession that it *never* sent a formal "right to sue" notice to the charging party in this case (EEOC Brief, p. 4, n. 3) and because of its inability to deny that its regular practice is *never* to send such notice unless specifically requested to do so (See B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 766-77 (1976) [hereinafter cited as SCHLEI & GROSSMAN], the EEOC does not, and obviously cannot, contend that the 180-day language is a notice requirement.

[2]*E.g. Bauman v. Union Oil Co.*, 400 F.Supp. 1021, 1027 (N.D. Cal. 1973) ("Plaintiff and the Commission argue that a suit letter issued prior to 180 days is valid."); *Gary v. Industrial Indemnity Co.*, 7 FEP 193, 195 (N.D. Cal. 1973) (EEOC argued that "[w]e do not believe Congress intended to delay the right of aggrieved persons to file suit" when the EEOC will not act within 180 days); *Westerlund v. Fireman's Fund Ins. Co.*, 11 FEP 744, 745 (N.D. Cal. 1975) (EEOC amicus brief argued no temporary bar); *Howard v. Mercantile Commerce Trust Co.*, 10 FEP 158, 158-59 (E.D. Mo. 1974); *Lewis v. FMC Corp.*, 11 FEP 31, 34 (N.D. Cal. 1975); *Budreck v. Crocker Nat'l Bank*, 407 F.Supp. 635 (N.D. Cal. 1976).

[3]Another example of the EEOC's propensity to argue positions to this Court different from those it has argued to lower courts is revealed by the statement in its Brief that the Commission lacks power to bring its own enforcement action when the complainant files his or her own suit. EEOC Brief, p. 22, n.9. Yet the EEOC argued, and prevailed on, exactly the opposite interpretation before the Third Circuit in *EEOC v. North Hills Passavant Hospital*, 554 F.2d 664 (3d Cir. 1976). If, as the EEOC *now* contends, it cannot sue independently once the charging party has filed suit, this is strong evidence that the EEOC's right to sue on its own expires after 180 days. Petitioner's Opening Brief, p. 24.

These inconsistencies simply reveal the EEOC's belief that the 180-day statutory language in question either means nothing at all or whatever the EEOC may find convenient to argue in the context of a particular case. In other words, the EEOC simply has *no* consistent explanation of what the 180-day provision means. Yet Petitioner has consistently argued that this 180-day language means exactly what Senator Dominick and Senator Javits explained that it meant shortly before the provision was passed:

Senator Dominick:

> ". . . the time period within which the Commission may file a civil action . . ."

Senator Javits:

> ". . . the allowable time for the Commission to move into a given situation."[4]

Second, the EEOC contends that Congress considered but rejected a provision that would have terminated the Commission's authority upon the filing of a private action after the expiration of 180 days. EEOC Brief, pp. 6, 17. However, that provision was part of the cease and desist bill that was finally *rejected* by Con-

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[4]1972 LEG. HIST. 1347 (Senator Dominick); 1972 LEG. HIST. 1528 (Senator Javits). The EEOC's argument (EEOC Brief, p. 21, n. 8) that both Senators contradicted themselves on this point two weeks earlier is based solely on its reading of the earlier quotations out of context. As explained in Petitioner's Opening Brief at pages 21-23, the remarks quoted by the EEOC in its brief were clearly directed by the Senators to when the EEOC could first sue, not when it could last sue.

gress in favor of court enforcement because court enforcement was deemed *more* expeditious than cease and desist! In any event, the court enforcement system and the cease and desist proposal involved two fundamentally different procedures.[5] In these circumstances, it is obviously unreasonable to assume that Congress intended no time limitation whatever on the more expeditious system that it did enact.

Third, the EEOC contends that the Joint Conference Committee's use of the word "elect" to describe the charging party's right to sue establishes that the EEOC's right to sue must be interminable in order that the charging party has "the option either to sue in his own name or to rely upon the Commission's enforcement efforts." EEOC Brief, p. 22. However, that interpretation of the word "elect" is refuted by the quotation itself, which refers to allowing the person aggrieved "to elect to pursue his or her own remedy" where there is "*dismissal of the charge.*" [Emphasis added]. Obviously, therefore, the word "elect" was used in the sense of the charging party's right to decide to sue or not to sue, not the right to decide to sue or have the EEOC sue. Furthermore, the irony of the EEOC's citation of this passage is that, because of the EEOC's refusal to act within the 180 days, the Joint Committee's determination "to make sure that the person aggrieved does not have to endure lengthy delays" has been totally frustrated by the EEOC.[6]

[5]For example, in an administrative cease and desist procedure which also gives the charging party a right to sue in court, obviously it would be necessary to state what would happen to the cease and desist process once the private litigant files a court action. That would not be necessary where the sole enforcement procedure is through filing suit in court.

[6]The EEOC also attempts to make much of the argument that Congress knew how to state an explicit limitation when

Fourth, the EEOC expresses concern that "thousands of complainants" who are "poor and unable to afford legal representation" would be "forced to bring suit themselves" if the 180-day provision were read as a limitation on the EEOC's right to sue. EEOC Brief, p. 26. In truth what would happen is that instead of having to wait three to five to seven years for the EEOC to act, these "thousands of complainants" would be promptly notified of the significant array of statutory rights conferred on them by Congress—the right to bring suit, the right to have court-appointed counsel, the right to commence action without payment of fees, costs or security, and the right to a reasonable attorneys' fee award if they prevail—rights which the EEOC conveniently ignores and thereby denies because of its total disregard of the 180-day provision.

Fifth, the EEOC makes much of its conciliation role,[7] assumes that a time limitation would "nullify" its conciliation efforts by requiring it to sue prematurely, and then theorizes that Congress could not have intended this result. EEOC Brief, pp. 24-27. But the EEOC's view that infinity is the only parameter on its right to sue reveals a total ignorance of both the legislative determination made in 1972 and the realities of modern practice, for Congress recognized that it was not the *interminable* potential of suit but the *imminence* of actual suit which induces conciliation and compliance. Indeed, Senator Dominick—the author

it wanted to (EEOC Brief, pp. 6-7, 18 n.7). Yet only two of those statutory "shall" commands are directed at the EEOC, and once again the EEOC's regular practice has been *not* to do what Congress said it "shall" do: (1) 10-day notice to respondents and (2) the 180-day provision here in question. *See SCHLEI & GROSSMAN* 774-775, 776.

[7]Despite its willingness to issue right to sue letters before the conciliation process is complete.

and principal spokesman for the court enforcement bill which passed—explained the advantage of court enforcement as follows:

> "The *imminence* of court action, coupled with the threat of adverse publicity and immediately enforceable orders will serve as a powerful inducement to voluntary settlement." [Emphasis added]."[8]

That was precisely the point made by Judge Moore in his dissenting opinion in *EEOC v. Louisville & Nashville R.R. Co.*, 505 F.2d 610, 619 (5th Cir. 1974), *cert. denied*, 423 U.S. 824 (1975), wherein he concluded that the 180-day provision is a limitation on the EEOC's right to sue:

> "It is well-known that an imminent deadline, and in particular the pendency of a lawsuit, is apt to make even the most hardline bargainers soften their position. Thus, the 180-day limit on the Commission's right to sue seems likely to promote settlements."

This, of course, is the full answer to the EEOC's concern (EEOC Brief, pp. 8, 25) that recalcitrant respondents will deliberately prolong the conciliation process in the hope of beating the 180-day limitation. As any experienced lawyer knows, nothing will bring that respondent to a serious position like the certainty of a lawsuit in, for example, 15 days unless he modifies his position. Where an acceptable conciliation agreement is not then obtained within the period specified, the statutory prerequisites to suit would be met,[9] and suit would then be properly filed, after which

[8]1972 *LEG. HIST.* 794.

[9]See EEOC Brief, pp. 15, 19 and 25.

time the court could of course permit up to 60 more days of conciliation effort if appropriate.

Indeed, the existence of a statutory limitation period is the surest guarantee of prompt agency action and effective conciliation on employment discrimination claims. By contrast, the EEOC's increasing backlog over the last five years is the clearest proof that interminable delay frustrates rather than promotes the effective administration of Title VII.

Finally, while acknowledging the importance to Congress of speedy administration, the EEOC characterizes speedy administration as subordinate to effective administration. But the EEOC is missing the entire point of the 1972 debate: that "justice delayed is justice denied" and thus effective administration and speedy administration cannot be divorced from one another.

Perhaps recognizing the fatal defects in its position, the EEOC takes final refuge in its own incompetence by insisting that Congress knew in 1972 that it could not act within 180 days and thus could not have intended that limitation on its right to sue. *Yet if it were true that Congress knew that the EEOC could not act within 180 days, why would Congress have forced aggrieved parties to wait for six months of EEOC inaction before having the right to file suit on their own?* Nowhere does the EEOC offer any answer to that question.

The reason for the 180-day wait is obvious, for the *only* justification for forcing the aggrieved party to wait six months before filing suit was the Congressional conviction that the EEOC *would* be acting during that period, taking steps which would have a genuine prospect of resolving the case in less than 180 days. Thus, the fact that charging parties may

not act within the first 180 days is the clearest proof of all that Congress was convinced that the EEOC *would* act within that time period. Indeed, Congress specifically expanded the time period from 60 days to 180 days in 1972 just to be certain that the EEOC would have time to act.

Thus, this Court's holding that the 180-day language is a limitation on the EEOC's right to sue will further the purposes of Title VII, while leaving Congress with the responsibility of providing further assistance to the EEOC if necessary to discharge the duties assigned to that agency in 1972. On the other hand, a decision by this Court holding that the EEOC's right to sue is interminable would in fact frustrate the objectives of Title VII by causing the delay of justice—and thus its denial—to be all the more certain and permanent.

B. The Applicability of the Most Analogous State Limitation Period.

The Ninth Circuit decision below that state statutes of limitation are inapplicable to EEOC suits to collect back pay for private individuals was predicated in part on that court's analogy to National Labor Relations Board enforcement procedures (A. 32-33). Petitioner's Opening Brief at pages 41-43 demonstrated the fallacy of that analogy, and it is significant that the EEOC in its Brief does not even attempt to support the Ninth Circuit's position in this regard. However, four points raised by the EEOC on the subject of the applicability of the most analogous state limitation period do warrant discussion.

First, the EEOC's characterization (EEOC Brief, p. 31) of the decision in *United States v. Nashville,*

Chattanooga & St. Louis Railway Co., 118 U.S. 120 (1886), as demonstrating that state limitations periods apply only where there is an express Congressional intention to that effect is superseded by cases such as *United States v. Beebe,* 127 U.S. 338 (1888), and is inapplicable to the instant suit. In the *Nashville* case, the United States sued to collect money for its treasury on bonds owned by the United States, and the Court characterized the United States as "asserting rights vested in it as a sovereign government."[10] *Nashville* is, therefore, cited among and consistent with the "sovereign immunity" cases discussed in Petitioner's Opening Brief at pages 37-38. Where, however, as here, the United States is suing to collect money for private individuals, it is suing not as a sovereign but as a conduit for private individuals who could have sued themselves and is therefore governed by state statutes of limitation as held in the *Beebe* case. Indeed, the EEOC itself states that Congress gave it "statutory authority to bring civil actions to enforce *private rights.*" EEOC Brief, p. 5 [Emphasis added].[11]

Second, the EEOC is incorrect in stating (EEOC Brief, p. 31) that the Act by its terms does not subject the Commission's enforcement litigation to state limitations periods. Not only is 42 U.S.C. Section 1988

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[10]118 U.S. 120, 125 (1886).

[11]The *Minnesota* and *Jackson County* decisions cited by the EEOC on pages 37-38 are both distinguished by the fact that Title VII plaintiffs are not wards of the state, but citizens armed with statutory rights to sue on their own with court-appointed counsel and attorneys' fees, and are thus themselves an integral part of the enforcement scheme, and by the fact—discussed in text *infra* at pages 9-10 that Congress has enacted statutory provisions under which state statutes of limitation should govern if no federal limitations period is found in Title VII.

specifically referred to in the majority decision in *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 464 n.10 (1975), as suggesting a Congressional intent to apply state statutes of limitation, but indeed, Section 708 of Title VII itself specifically states:

> "Nothing in this subchapter [Title VII] shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this subchapter." 42 U.S.C.A. § 2000e-7 (1974).

As the word "person" is specifically defined by the Act in Section 701(a) to include "governmental agencies" and therefore includes the EEOC,[12] Section 708 establishes that nothing in the Act relieves the EEOC from any liability or duty under any state law, including the duty to bring an action within the appropriate state limitations period and the liability and penalty of having its case dismissed if it fails to do so.[13]

The EEOC cannot escape this conclusion by raising the specter of thereby being subjected to the "vagaries" of state statutes of limitation. Multistate businesses and national labor unions confront 50 state limitation periods every day under Section 301 of the Labor

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[12]See generally *Rogers v. EEOC*, 14 FEP 625 (D.C. Cir. 1977) (EEOC covered by Title VII).

[13]Since no distinction was drawn by Congress between injunctive relief and back pay, this constitutes another persuasive reason why the distinction so drawn in *EEOC v. Griffin Wheel Co.*, 511 F.2d 456, 459, *aff'd on rehearing*, 521 F.2d 223 (5th Cir. 1975), should be rejected. See Petitioner's Opening Brief, pp. 43-45.

Management Relations Act, 29 U.S.C. §185, without discernible difficulty. See *Auto Workers v. Hoosier Cardinal Corp.*, 383 U.S. 696 (1966). Indeed, that this Court has held state statutes of limitation applicable in Section 301 actions is all the more significant in light of the Court's holding that it should fashion a body of federal common law to govern Section 301 suits. *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 456 (1957). If national unions and multistate businesses can comply with state limitations periods, what is so special about the EEOC? Certainly it cannot be that the EEOC is suing under Title VII, because there is nothing "peculiar to a federal civil rights action that would justify special reluctance in applying state law." *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 464 (1975).[14]

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[14]The EEOC makes passing reference in a footnote to the decision of this Court in *Holmberg v. Armbrecht*, 327 U.S. 392 (1946), for the proposition that in a private suit to enforce a federal right, where the sole remedy is in equity, a state statute of limitations will not be applied. First, any alleged applicability of that concept in this case, it is to be noted, was rejected by the Court of Appeals for the Fifth Circuit in *U.S. v. Georgia Power Company*, 474 F.2d 906, 923 n.22 (5th Cir. 1973), at least insofar as back pay is concerned. Second, in *Holmberg*, unlike the instant case, there were no Congressional statutes making specific reference to the use of state law. In fact, in *Holmberg* it was essential to federal policy concerning fraudulent concealment that federal law be applied in order to preserve the right of action which otherwise would have been barred by the state statute of limitations. By contrast, where the application of a state statute of limitations would not frustrate federal policy, even though important federal policy considerations were at issue, *Holmberg* has not been followed. *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 (1975); *Auto Workers v. Hoosier Cardinal Corp.*, 383 U.S. 696 (1966). In the instant case, the application of a state limitations period would actually further the purposes of the Act. *Holmberg* has been recognized as requiring such an analysis of how the underlying statute's purposes will be fulfilled. *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 470 (1975) (dissenting opinion); *Auto Workers v. Hoosier* Cardinal Corp., 383 U.S. 696, 709 (1966) (dissenting opinion).

Third, the EEOC argues that the statute of limitations should not begin to run until all of its administrative actions are completed. EEOC Brief, p. 33. However, this argument totally ignores the fact that at all times after a charge is filed, the EEOC has total control over the case and thus the ability at any time to complete its investigation and conciliation process and properly file suit. SCHLEI & GROSSMAN 1030. Further, it is obvious that acceptance of the EEOC's argument would totally negate the application of a state limitations period, for the exception would swallow the rule. *Cf. Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 (1975).

Equally specious is the EEOC's argument (EEOC Brief, p. 32) that state statutes cannot be applicable because they might run before the EEOC is empowered to bring suit, for Congress has certainly made an explicit grant of authority of 180 days within which the EEOC may bring suit and that express grant would obviously prevail over any state limitation period which might arguably have run before the 180 days had expired.

Conclusion.

In closing its Brief, the EEOC contends that it *should* have an interminable right to sue *because* the prejudice to respondents resulting from lengthy delays "appears exaggerated" and any prejudice is "likely to be felt more strongly by the Commission." (EEOC Brief, pp. 38-39). The EEOC thus focuses on the alleged prejudice to *its* position, without a word about unfairness to charging parties, as though Congress had created Title VII for the convenience and benefit of the EEOC rather than for the protection of victims

of discrimination. This myopic view of the EEOC is the root of the entire problem in this case and clearly reflects the EEOC's refusal to come to grips with the fact that the purposes of Title VII would be furthered, not frustrated, by the position advocated by the Petitioner to this Court.

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Respectfully submitted,

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